American Bar Association
ADOPTED BY THE HOUSE OF DELEGATES
August 6-7, 2001

Homelessness and Poverty (Report Nos.105B)

RESOLVED, That the American Bar Association urges the Administration to support and Congress to enact or amend welfare legislation to require due process protections in the administration of welfare programs, particularly notice and an opportunity to be heard, before the imposition of financial sanctions against families for noncompliance with program requirements.
Background and Applicable Law

Subsequent to the landmark Goldberg v. Kelly decision in 1970, it has been clear that the federal constitutional right to due process limits the manner in which welfare aid to needy families may be terminated or reduced and requires notice and a right to be heard before such actions take effect. Since the comprehensive overhaul of welfare in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, opportunities for termination or reduction are more numerous, as work requirements and eligibility conditions have increased. In particular, financial sanctions for noncompliance with work or other rules have increased dramatically. Although the principles of Goldberg were not undermined by federal welfare reform, federal law currently contains virtually no safeguards or procedural protections when states impose penalties for alleged violations of program rules. With the Temporary Assistance to Needy Families (TANF) federal welfare program up for reauthorization in 2002, it is appropriate to establish statutory safeguards to protect the right to due process.

Some states have made extensive use of sanctions in their TANF (Temporary Assistance for Needy Families) implementation efforts. Studies show that the families who get sanctioned often face serious employment barriers; they are more likely to have limited education and work history and more likely to have had health or mental health problems or to have been victims of domestic violence. During the upcoming TANF reauthorization process, there will be efforts to establish some basic safeguards in federal law, and the issue of sanctions will be a top priority.

Before 1996, federal law provided for work-related requirements in state welfare programs and states were expected to impose penalties for failure to meet applicable requirements. For example, if a parent was required to participate in a job search program or other work-related activity, the parent could be sanctioned for failure to do so without good cause. Before a sanction could be imposed, the state was required to offer a “conciliation process,” which typically involved informing the parent of what she had failed to do, offering a chance to correct the problem, and offering assistance if needed to come into compliance. If, after conciliation, the problem was not resolved, and the individual lacked good cause for failure to participate, the state could initiate a sanction. A sanction generally involved reducing, but not eliminating the family’s assistance. Before reducing the family’s assistance, the state was required to send notice, providing a right to an administrative hearing if the parent wished to contest the sanction.

In enacting TANF, Congress removed the basic protections of prior law. Under current law, a state may terminate all TANF assistance for failure to comply with work-related (or other) requirements, there is no requirement that there be any conciliation process prior to doing so, and (with one limited exception), there is no requirement that the state provide for good cause exceptions. Specifically, the statute states that if an individual "refuses to engage in work," the state must reduce or terminate the family’s assistance, "subject to such good cause and other
exceptions as the State may establish." 42 U.S.C. §609(7)(e)(1). When imposing sanctions, there is no requirement that a state provide an opportunity to resolve the problem, offer assistance in addressing the difficulty, or offer an opportunity for the individual to have assistance reinstated by coming into compliance. There is also no requirement that a state provide an opportunity for a hearing when a sanction is imposed, although all states have elected to maintain an administrative hearing process.

Differing State Approaches to the Sanction Process

Under TANF, most states have elected to make use of "full-family" sanctions, in which all TANF assistance to the entire family is terminated for noncompliance with work-related requirements. Sanctions comprise a significant share of case closures in some states, and twenty states have no conciliation process before sanctions are imposed for some or all families.

According to a GAO report, WELFARE REFORM: State Sanction Policies and Number of Families Affected, GAO/HEHS-00-44 (March 2000), thirty-seven states provide for full-family sanctions, either for the initial rule violation or for a subsequent violation. Fifteen states impose full-family sanctions for the first instance of noncompliance, and twenty-two states use a graduated sanction policy that eventually can result in full-family sanction. As a practical matter, in a number of states, the first instance of noncompliance is deemed to be a subsequent instance if it continues for a period of time. Federal law does not require that sanctions be imposed for any minimum time period, i.e., the state could remove the sanction as soon as the individual comes into compliance. However, the GAO reports that in total, 48 states have policies more stringent than required by TANF, either calling for full-family sanctions or extending the sanction after the family comes into compliance. In three states, a sanction can eventually result in a lifetime disqualification from eligibility for assistance.

The GAO found that 31 states continue to provide some form of conciliation process in all instances of noncompliance, five limit the number of conciliation opportunities, and fifteen states do not require any conciliation opportunities for any families.

There are no federal requirements for the information that must be contained in a notice of sanction. A review by HHS' Office of Inspector General, Temporary Assistance for Needy Families: Improving Client Sanction Notes, OEI-09-98-00292 (October 1999) found that most sanction notices reviewed by the OIG lacked some key elements, e.g., specifying exact actions a client must take to demonstrate willingness to comply, fully explaining the steps required to cure a sanction, providing information about contacting legal services offices. The OIG also found

1 There is a limited exception: a state may not reduce or terminate assistance to a single parent with a child under age six if the parent is unable to meet work requirements because of the unavailability of child care. 42 U.S.C. §607(b)(5).

While current law only states that a State's TANF plan shall include "an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process" (42 USC 608(q)(1)(B)(ii)), there are no requirements as to what this process must include, such as the opportunity to present evidence, be represented, have the matter decided by a neutral arbiter, etc.
that some sanction notices were difficult to understand, and recommended that the federal government "encourage" States to issue understandable and comprehensive notices. (To date, the federal government does not appear to have followed up on this recommendation.)

Recently, a group of welfare recipients represented by a team of pro bono attorneys successfully challenged the notices for sanctions used by the State of Colorado and Adams County. Weston v. Hammons, Case No. 98CV0412 (CO Dist. Ct., Denver, May 24, 1999), was a class action lawsuit involving more than 900 families who, as a result of faulty notices, lost life sustaining benefits when they were improperly sanctioned or terminated from the Colorado Welfare Program. The lawsuit was based on constitutional due process claims. The plaintiff class challenged the adequacy of the vague and confusing notices. The notices failed to provide the sanctioned individuals with specific information about what they had done wrong, and the notices failed to tell them how they could correct the problem or appeal the decision. Denver District Court Judge Larry Manzanares found for the plaintiff class on all claims and ordered Adams County to stop reducing or terminating welfare benefits until it developed improved notices.

Useful federal data on the extent of sanctioning is unavailable due to the inconsistent definitions used by states to classify sanctions; what may be considered a sanction in one state will just be considered a case closure for noncompliance in another state. The GAO found a wide range in the frequency of sanctioning among states. Nationwide, states report that 6% of case closures are due to sanctions (though 16.5% are reported closed due to "policy" and 54% closed due to "other"). However, in five states (Florida, Idaho, Iowa, Mississippi, Missouri), at least 20% of case closures are reported due to sanctions.

A number of recent studies have examined the characteristics of families whose cases are closed due to sanctions. The consistent finding is that these families are more likely than other families to have serious barriers to employment. Sanctioned families are likely to have less education and less work history. They are more likely to report illness, mental illness or disability. They are more likely to have been victims of domestic violence. And, after leaving assistance, they are less likely to be employed than are families that leave assistance for other reasons.

Sanctions and Reauthorization

In 2002, TANF is scheduled to be reauthorized. Many issues will be addressed during reauthorization, including such topics as funding, program goals, time limits, work-related provisions, immigrant restrictions, marriage and family formation. A number of advocacy and grassroots organizations also hope to bring significant attention to problems in the current law governing sanctions. In particular, advocates will likely raise some or all of the following issues:

- the need to establish the principle that a sanction should not be imposed when there is good cause for noncompliance;
- the need for all states to include a conciliation process, in which individuals are told what they allegedly failed to do and what needs to be done to address the problem, and in which the state offers reasonable assistance in meeting program requirements;
- the need for clear, understandable notices;
- the need for federal law to encourage states to actively work with and assist families with serious employment barriers such as serious literacy problems, English-language difficulties, health and mental health difficulties;
- the need to ensure that sanctions do not continue (or do not continue for an unreasonable period) after a sanctioned individual comes into compliance; and
- the need for follow-up efforts after states impose sanctions to attempt to contact the family and offer assistance to help the family enter into compliance.

Conclusion

As the reauthorization of the TANF program comes before the Administration and Congress, the debate on the sanctioning process will undoubtedly receive great attention. Welfare recipients, just like other beneficiaries of government programs, have due process rights. Considering that the current problems associated with the sanctioning of TANF recipients involve the fundamental right of due process and equal application and enforcement of the law, it is important for the American Bar Association to lend support to defend the rights of the most disadvantaged in their pursuit of justice.

Respectfully submitted,

Josephine A. McNeil
Chair

August 2001
GENERAL INFORMATION FORM
To Be Appended to Reports with Recommendations

Submitting Entity: Commission on Homelessness and Poverty
Submitted By: Josephine A. McNeil, Chair

1. Summary of Recommendation(s).
   This recommendation supports the enactment or amendment of welfare legislation
   to require constitutional due process protections in the administration of welfare
   programs, particularly in the context of financial sanctions against families,
   including notice and an opportunity to be heard before sanctions or penalties are
   imposed.

2. Approval by Submitting Entity.
   Approved by the Commission on Homelessness and Poverty on May 22, 2001.

3. Has this or a similar recommendation been submitted to the House or Board previously?
   No.

4. What existing Association policies are relevant to this recommendation and how would
   they be affected by its adoption?
   This American Bar Association has adopted policy opposing cuts in financial
   assistance programs that would result in the failure to meet the "basic needs" of
   the recipients (August 1992), as well as policy regarding the "devolution" of
   federal assistance programs to the states (February 1997). The American Bar
   Association House of Delegates approved recommendations opposing restricting
   eligibility for federal assistance programs based on immigration status (August
   1997) or on the basis of "additional children" born while receiving assistance
   (February 1995), but has not addressed the issue of TANF sanctions. The current
   recommendation would complement and enhance previously adopted policy by
   allowing the Association to continue to support constitutional due process rights.

5. What urgency exists which requires action at this meeting of the House?
   The 107th Congress is currently preparing to reauthorize the 1996 welfare reform
   legislation known as the Personal Responsibility and Work Opportunity Act
   (which includes the Temporary Assistance to Needy Families (TANF) program)
   that will expire on October 1, 2002. Congressional hearings are underway, and
   the reauthorizing legislation will likely move through the House and Senate
   during the summer and fall of 2002. Adoption of this recommendation would
   allow the Association to join the debate and express its views on this important
   matter.
6. **Status of Legislation.** (If applicable.)

Provisions and issues regarding TANF reauthorization are currently being debated in congressional hearings.

7. **Cost to the Association.** (Both direct and indirect costs.)

n/a

8. **Disclosure of Interest.** (If applicable.)

n/a

9. **References.**

In late May 2001, this Report and Recommendation was referred to the Chairs and staff of all ABA Sections and Divisions and the Chair and staff of the Steering Committee on the Unmet Legal Needs of Children.

10. **Contact Person.** (Prior to the meeting.)

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11. **Contact Person.** (Who will present to the House.)

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12. **Contact Person Regarding Amendments to This Recommendation.**

There are no known proposed amendments at this time.